Petition

81-1478

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No. 81-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RALPH L. HARVEY AND
MARLIN OIL CORPORATION,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND
THE UNITED STATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Title V of the Natural Gas Policy Act of 1978 requires the States to administer certain complex pricing provisions of the statute under rules and regulations established by the Federal Energy Regulatory Commission, with State action subject to review by the FERC and the United States Courts of Appeals. The question presented is whether such a statutory requirement violates state sovereignty.

Title I of the Natural Gas Policy Act of 1978 extends Federal price controls to gas flowing only in intrastate commerce under contracts existing on November 8, 1978. The question presented is whether the Commerce Clause grants Congress the power to regulate a class of commerce wholly intrastate that by the terms of the statute can have no effect on interstate commerce.

PARTIES

The parties to this case are the States of Oklahoma, Texas, and Louisiana, and Ralph L. Harvey, individually and as president of Marlin Oil Corporation. The plaintiffs sued the Federal Energy Regulatory Commission, which was joined as a defendant by the United States.

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"MMBtu" means millions of British thermal units

"Mcf" means one thousand cubic feet

No. 81-____

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October Term, 1981

Ralph L. Harvey and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, 661 F.2d 832, is reproduced as Appendix A to the petitions of Oklahoma, Texas, and Louisiana in No. 81-1232 ("State App."). The opinion of the United States District Court for the Western District of Oklahoma, reported at 494 F. Supp. 636, is reproduced in the States' petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1981. Mr. Justice White granted an extension of time for filing this petition until January 11, 1982, in No. A-534. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case arises primarily out of the Constitution of the United States, Art. I, §8, cl. 3; Art. IV, §4; Amend. X, and Sections 105, 106, and 503 of the Natural Gas Policy Act of 1978 and the regulations of the Federal Energy Regulatory Commission thereunder. The relevant provisions are reproduced in the Statutory Appendix to this petition.

STATEMENT OF THE CASE

1. Proceedings in the Court Below

Congress enacted the Natural Gas Policy Act on November 9, 1978. Oklahoma, Texas, and Louisiana filed suit on November 20, 1978, against the Federal Energy Regulatory Commission (FERC) for a declaratory judgment that the Act, 15 U.S.C. 3301 *et seq.* (Supp. 1981), exceeds Congress's powers under the Constitution. The State of Wyoming and Ralph L. Harvey, individually and as president of Marlin Oil Corporation ("Harvey"), intervened as plaintiffs. The United States intervened as a defendant.

In 1979, the defendants moved to dismiss part of the plaintiffs' claims and for summary judgment as to the remainder. The plaintiffs likewise moved for summary judgment. The district court denied the motions to dismiss but granted summary judgment for the Government. 494 F. Supp. 636 (State App. B). The United States Court of Appeals for the Tenth Circuit affirmed. 661 F.2d 832 (State App. A). The states of Oklahoma, Texas, and Louisiana have filed a petition for certiorari in No. 81-1232, which Harvey adopts. Harvey asks this Court to review and reverse the judgments of the lower courts.

2. Statement of Facts

The natural gas producing industry has been called the first American industry ever subjected to permanent price controls in peacetime. Kitch, *Regulation of the Field Market for Natural Gas by the Federal Power Commission*, 11 J. LAW & ECON. 243

(1968). This appeal challenges Congress's most recent experiment in economic regulation of the field markets for natural gas, which extends Federal price controls to all commerce in natural gas and orders the States to administer the pricing decisions.

a. The Natural Gas Act

Federal regulation of the natural gas industry began with the Natural Gas Act of 1938, 15 U.S.C. 717 *et seq.*, which authorized the Federal Power Commission to regulate the "transportation of natural gas in interstate commerce [and] the sale in interstate commerce of natural gas for resale for ultimate public consumption . . . ." The Natural Gas Act did not "apply to any other transportation or sale of natural gas," which excluded intrastate sales. *Id.* In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), this Court held that the Natural Gas Act extended to sales by producers at the wellhead if the producer sold gas for resale in interstate commerce. A series of cases in this Court such as *California* v. *LoVaca Gathering Company*, 379 U.S. 366 (1964), produced two separate systems for the sale and transportation of natural gas.

Between 1954 and 1978, the FPC closely regulated the price of natural gas sold interstate while the market prices of other fuels increased rapidly. In the 1970s, the price of intrastate natural gas climbed sharply above the interstate ceiling price. As a result, exploration for interstate supplies dropped and additions to interstate reserves inexorably declined. Interstate demand for this bargain fuel rose. *See* 494 F. Supp. at 654-55. The FPC claimed every possible cubic foot to satisfy the interstate consumer. *See California* v. *Southland Royalty Company*, 436 U.S. 519 (1978). The States placed no price ceilings on intrastate markets, so intrastate prices rose and balanced demand. Congress began to search for a policy that would create a national market.

b. The Natural Gas Policy Act

Congress passed the Natural Gas Policy Act of 1978 as one of five energy statutes.[1] Congress sought to ease the natural gas shortage in the interstate market by fastening price controls on the intrastate markets and creating a unified national price for various categories of "new" gas found after February 19, 1977. Natural Gas Policy Act §§102, 103, 107, 108; 15 U.S.C. 3312, 3313, 3317, 3318. Congress left the existing FPC interstate rates standing, but froze the price terms of existing intrastate contracts where they stood on November 9, 1978, which was the date of enactment. *See* NGPA §105. The statute deregulates several of the categories at various times, but leaves much of the nation's gas, both interstate and intrastate, under perpetual ceilings. The statute contains six titles, covering price controls at the wellhead (§§101-123, 15 U.S.C. 3311-3333); incremental pricing of industrial gas (§§201-208; 15 U.S.C. 3341-3348); provisions for a future natural-gas emergency (§§301-315; 15 U.S.C. 3361-3375); curtailment policies for shortages (§§401-404; 15 U.S.C. 3391-3394); administrative and enforcement provisions (§§501-508; 15 U.S.C. 3411-3418); and coordination with the Natural Gas Act (§§601-602; 15 U.S.C. 3431-32).

This appeal challenges certain of the principal provisions of the Act in Titles I, "Wellhead Pricing," and V, "Administration, Enforcement, and Review." Title I classifies all natural gas sales into eight major categories and many sub-categories, depending on such variables as the date a well was drilled, the date of the

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[1] The others were the Power Plant and Industrial Fuel Use Act, Pub. L. 95-620, 92 Stat. 3289 *et seq.*, the National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206 *et seq.*, the Energy Tax Act, Pub. L. 95-618, 92 Stat. 3174 *et seq.*, and the Public Utility Regulatory Policies Act, Pub. L. 95-617, 92 Stat. 3117 *et seq.* The last of these has been held unconstitutional in *Mississippi* v. *FERC*, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981), *prob. juris noted*, No. 80-1749, 49 U.S.L.W. 3930 (U.S. June 16, 1981).

contract, the type of the well, the depth of the well and its distance from other wells, the volume of gas produced, the reservoir, prior sales of gas in interstate commerce, and the like. The statute does not easily yield to a thumbnail description, but the pricing categories can be broadly described as follows:

c. Gas Pricing

Section 102, 15 U.S.C. 3312, allows "new wells," "new reservoirs," and new offshore leases to take a price of $1.75 per MMBtu adjusted each month for inflation and also for a real increase of 3.5 to 4 percent. The Section 102 price for January, 1982, is $3.003. 46 Fed. Reg. 53654 (Oct. 30, 1981).

Section 103, 15 U.S.C. 3313, allows all onshore wells drilled after February 19, 1977, a ceiling price of $1.75 per MMBtu adjusted for inflation alone. The Section 103 price for January, 1982, is $2.572. *Id.*

Section 104, 15 U.S.C. 3314, preserves the "just and reasonable rate" of the FPC under the Natural Gas Act for April, 1977, but allows it to increase with inflation. These rates now vary from 26.5 cents to $2.128 per Mcf. 18 C.F.R. §271.101, Table II.

Section 105, 15 U.S.C. 3315, freezes the prices of gas sold under "existing intrastate contracts" as they stood on November 8, 1978. Congress allowed no adjustment for inflation for these contracts, although Congress provided that the prices could increase if the contracts contained escalator clauses to the level of the "new-gas" price of Section 102. Intrastate gas priced at One Dollar or less per MMBtu would be regulated in perpetuity (§121, 15 U.S.C. 3331(a)(3)).

Section 106, 15 U.S.C. 3316, sets the price for both interstate and intrastate "rollover" contracts after November 8, 1978, at the price collected in the last month of the original contract, adjusted thereafter for inflation. These prices vary with the contracts.

Section 107, 15 U.S.C. 3317, creates special prices for "high-cost" gas. Congress deregulated gas from deep wells

in 1979, and the FERC sets higher prices for gas from "tight" or impermeable formations and other extraordinary categories. The current tight-gas price is $5.144. 46 Fed. Reg. 53564 (Oct. 30, 1981).

Section 108, 15 U.S.C. 3318, creates a special price for "stripper-well" gas produced from wells that are economically marginal. The current stripper price is $3.217. *Id.*

Section 109, 15 U.S.C. 3319, covers any gas that fails to qualify for another category. This price was set at the rate of $1.45 that the FPC announced in 1976. The current price for "other" gas is $2.128. *Id.*

Section 110, 15 U.S.C. 3320, allows producers to recover certain state taxes together with gathering, compression, and treating costs. The FERC has yet to issue a final rule allowing collection of these costs in addition to the ceiling rates.

d. Delegation to the States

Title V creates procedures for the states to implement the ceiling prices through their production agencies. Section 503, which provides the method for qualifying wells for the new price categories of Sections 102, 103, 107, and 108, is central to this appeal. The plan of the statute is that the state agency having regulatory authority over natural gas production must decide whether wells qualify for the new prices of Sections 102, 103, 107, or 108. If the production occurred on Federal lands onshore or offshore then the Federal production agency (the United States Geological Survey) would make the well determinations. *See* 18 C.F.R. §274.501(a). Section 503(c) provides:

> (c) STATE AUTHORITY. — (1) GENERAL RULE. — A Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a).

15 U.S.C. 3413(c)(1).

Since December 1, 1978, 29 States have made 132,925 determinations to qualify wells under this statute. Foster Nat'l

Gas Rep't No. 134!, at 23 (Dec. 3 , 1981). Section 503(c)(2)(A) provides that a State agency may waive this authority to make well determinations, but only by entering into an agreement of waiver with the FERC. The Conference Report provides:

> The conference agreement provides a delegation to certain State or Federal agencies to make classification determinations required by Title I.

H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. 117 (1978) (hereinafter Conf. Rep't).

The legislative history explains that State authority can only be waived at the FERC's option.

> The State or Federal agency having regulatory jurisdiction with respect to the production of natural gas may waive its authority to make determinations under this section, if the Commission agrees.

Conf. Rep't 119. The FERC may prescribe the content of the filings, and the State must provide the FERC with "timely notice in writing" of each well determination the State makes.

> Such notice shall include such substantiation and be in such a manner as the Commission may, by rule, require.

§503(a)(2); 15 U.S.C. 3413(a)(2). The Act then creates appellate powers in the FERC. The FERC has "authority to review and reverse" any State decision not supported by "substantial evidence" in the State record. §503(b)(1); 15 U.S.C. 3413(b)(1). The FERC may remand any State decision that "is not consistent" with the FERC's public records. A "party aggrieved" or one affected by a remand may appeal to the United States Court of Appeals. §503(b)(4); 15 U.S.C. 3413(b)(4).

e. Intent of Congress

Congress realized that it was creating a system in which the State agencies were incorporated into the Federal system. The Conference Report describes a bifurcated system, with the State courts reviewing any procedural questions and the Federal

Energy Commission and the Courts of Appeals reviewing questions of substantial evidence. The committee wrote:

> Nothing in this Title is intended to limit the jurisdiction of State courts to decide questions of State law. A party aggrieved by procedural aspects of State or Federal agency determinations may pursue whatever appeal rights are otherwise available under State or Federal law. The party is, at the same time, bound by the record made in the proceeding for purposes of Commission review. Thus, the party is free simultaneously to pursue Commission review, arguing that the record as transmitted did have substantial evidence to support the determination and to pursue procedural review, in State court for State determinations, arguing that the record is prejudiced due to procedural error. That State or Federal court's review of the record is limited to procedural questions. If successful before the Commission, the party has prevailed in any event. If unsuccessful there, but successful in the State or Federal court review, there would be an opportunity to make a new record before the State or Federal agency.

Conf. Rep't 119.

f. Agency Interpretations

The FERC interprets the statute to mean that the Commission has the option whether to accept a waiver. In the preamble to its Order No. 41, the FERC interpreted Section 503 as follows:

> One State filed a comment suggesting that the Commission does not have the discretion to refuse any request for a waiver. We disagree. Section 503(c)(2)(A) of the NGPA stipulates that a Federal or State agency may waive its authority to make determinations "by entering into an agreement" in accordance with subparagraph (B). Subparagraph (B), in turn, provides that any waiver may be made "only by a written agreement" between the agency and the Commission. We believe that this language provides the commisson with the discretion to agree or not to agree to a proposal for a waiver and thus to grant or refuse a request for waiver.

44 Fed. Reg. 48664 (Aug. 20, 1979).

The Commission refuses to consider applications for well determinations and directs that all such applications be filed with the State agencies. In its interim regulations issued December 1, 1978, the FERC warned producers that no higher prices could lawfully be collected until the State having jurisdiction over the well agreed to administer the Federal program:

> Many comments requested deletion of the proposed condition . . . that collection cannot begin under this Section until the appropriate jurisdictional agency has filed with the Commission an undertaking to diligently consider and decide applications and the report on procedures to be used by the agency, as required by 274.105. These comments argue that this qualifying condition is unlawful or inequitable, chiefly because compliance is beyond any seller's control. The comments recommend that sellers be permitted to make interim collections under this Section after an appropriate filing with the Commission.

43 Fed. Reg. 56496 (Dec. 1, 1978).

The FERC refused to relieve the States of responsibility by allowing the producers to collect the higher NGPA prices without a State filing:

> The Commission believes that it is particularly important that higher prices dependent on determinations of eligibility should not be charged and collected, subject to refund, until a jurisdictional agency has undertaken to consider these applications and has established procedures to make determinations that on [sic] these applications. Moreover, collections under this section [503(e)(2)] should not continue if a jurisdictional agency is not actively proceeding to make specific determinatons.
>
> To better express our intent, the proposed §273.202(a) will be changed in two respects. First, this condition will be restated as a requirement that no filing to charge and collect a maximum lawful price under this section may be submitted to this Commission until the jurisdictional agency to which the application for determination has been made has filed the report and undertaking required by §274.105. As

> noted in the discussion of Subpart A of Part 274, the form of the undertaking has been modified to require the jurisdictional agency to state that it will take such steps as are reasonable, necessary or appropriate to perform its functions under Part 274. Second, unless a jurisdictional agency has notified the Commission by March 1, 1979, that it is actively processing the applications for determinations, then authority to make interim collections under this section will be suspended with respect to deliveries made during the period from March 1, 1979, until the date on which the jurisdictional agency gives notice that applications are being processed.

Id. at 56496-97.

g. Holdings of the Lower Courts

The district court recognized that the State regulatory agencies and courts constitute a "traditional governmental function" with which Congress may not interfere. The district court's opinion also recognizes that:

> [The NGPA] makes the state agency determination the first step in the federal administrative chain, delegating to the state agency, provided it consents, the duty of making the initial determination under the Act, with review thereafter in the appropriate federal forum.

494 F. Supp. at 659, App. B-34. The court held, however, that the Act does not force the states to carry out the Federal program because the Act contains no sanctions. The court concluded that "the state has the 'simple expedient' of not yielding to what she urges is federal coercion," *quoting Oklahoma* v. *Civil Service Comm'n.*, 330 U.S. 127, 143-44 (1946). The Court continued:

> There is no requirement of state cooperation and no sanctions are levied in the event a state agency refuses to act. While the Act requires the agreement of FERC before a waiver of state authority is effective, § 503(c)(2), there is no mandatory requirement of state agency action even absent FERC's agreement, and no sanction provided for a state whose agency does not act. Thus there is no "coercion" in

> the constitutional sense, and the Act in this respect must be upheld.

494 F. Supp. at 660, App. B-36-37.

The Court of Appeals apparently read the statute differently, construing the language to mean that the States could waive the delegation of federal authority:

> As in *Hodel* v. *Virginia*, the NGPA simply allows the states to participate in the administration of the Act. There, as here, "[i]f a State does not wish to submit a proposed permanent program . . ., the full regulatory burden will be borne by the Federal Government."

661 F.2d at 840; App. A-18. The Government took the position in the lower courts that if a State refused to administer the Act, the FERC would not allow collection of the Congressional incentive prices within that State (U.S. Br. 57-58). The petitioners Harvey and Marlin Oil ask this Court to review and reverse the decisions of the lower courts upholding this extension of Federal power.

SUMMARY OF ARGUMENT

This case goes beyond the issues of last Term's decision in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, ____ U.S. ____, 101 S. Ct. 2352 (1981). It also goes beyond the issues presented this Term in *Mississippi* v. *FERC*, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981), *prob. juris. noted*, 49 U.S.L.W. 3930 (U.S. June 16, 1981), where a companion statute has been held unconstitutional by a district court. The Natural Gas Policy Act extends Federal power into the State process and economy as has no other statute.

On its face, the NGPA "delegates" a Federal program to State agencies. The lower courts justify this appropriation of the State governments by finding no teeth in the delegation. The question for this Court is whether Congress may impose its will on a State, not whether Congress may punish the State. The decision in *National League of Cities* v. *Usery*, 426 U.S. 833, did not turn on whether Congress had enacted sanctions against the states. This Court struck down a statute that merely "impose[d] . . . requirements" on "the Government of a State or political subdivision thereof . . ." 426 U.S. at 839, 838. The Court that held the Surface Mining Act valid on its face should strike the NGPA as invalid on its face.

The statute does not say that the States may safely ignore it. But even beyond that, on brief the United States offered the States the option of "not yielding" and leaving their wellhead gas prices fixed at the 1975 level by Congress. The Government thus equates this to Federal enticement, which conditions Federal funds on State administration. To the contrary, this statute threatens the States with economic punishment aimed at destruction of the State revenue if they fail to exercise their authority under the NGPA. We believe this case represents a turning point in the relations of the Federal Government with the States if the Court accepts this justification.

The Government does not dispute that "Congress failed to provide an alternative to state participation in the administration of the NGPA" (U.S. Br. in the Ct. of App. at 52). As the district court correctly stated, there is "no example of an analogous regulatory scheme." 494 F. Supp. at 661, App. B-38. If Congress may legislate this way, we believe federalism itself has become a fiction. *Cf. Hodel* v. *Virginia Surface Mining & Reclamation Ass'n,* 101 S.Ct. at 2389 (Rehnquist, J., concurring).

Only a temporary enactment to meet a national emergency will justify an interference with State governments like those enacted here. But the Natural Gas Policy Act imposes determination procedures on the States in perpetuity.

Congress has even exceeded its sweeping powers under the Commerce Clause by imposing price controls on gas that moves wholly in intrastate commerce under existing contracts. This intrastate gas can have no effect on interstate sales under the terms of the statute itself.

ARGUMENT

I. The Tenth Amendment Forbids Congress to Curtail State Sovereignty by Imposing on the States the Duty to Administer a Federal Program.

1. This case arises out of a statute that renders state agencies the first step in a Federal administrative chain. The legislation creates an unconstitutional intrusion on state sovereignty.

In *National League of Cities* v. *Usery*, 426 U.S. 833, 843 (1976), this Court held that the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Last Term, the Court reaffirmed in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, ____ U.S. ____, 101 S.Ct. 2352, 2366

(1981), that the Constitution protects certain attributes of State sovereignty and prohibits Congress from exercising authority on the States as States. *Id.* at 2366. The Government has not denied that this legislation "directly impair[s] [the state's] ability to structure integral operations in areas of traditional functions." 101 S.Ct. at 2365. In fact, there can be no serious question that the NGPA satisfies each of the three requirements the Court laid down in the *Hodel* case.

> 1. Section 503 regulates the "States as States" in plain terms by delegating to their production agencies the execution of a Federal program.
>
> 2. The delegation addresses indisputable attributes of State sovereignty by placing State agencies under the direct supervision of the FERC and the Federal courts.
>
> 3. The statute impairs the States' ability to structure integral operations in areas of traditional functions because it creates new substantive and procedural authority binding on the States and conscripts State workers and funds to carry out the Congressional plan.

101 S.Ct. at 2366.

The NGPA simply takes over the State regulatory agencies and places them directly under the FERC and the Courts of Appeals. Does the Congress's omission of sanctions make the impairment of the State process any less direct? We believe an effort to justify this seizure by saying the States may refuse to comply is like saying that a man may refuse to turn over his wallet dispite the pistol pointed at his head. To compare this legislative intrusion to the device of conditional grants-in-aid misses the point. When Congress legislates directly against the State, coercion does not require sanctions.

In fact, the producing States have no choice but to administer the NGPA with their own funds and employees. If Congress told New York to clean up its docks under the supervision of the Environmental Protection Agency or drop shipping rates to 1975 levels, would the statute be "coercive"? As Mr. Justice Cardozo

observed, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 327 (1936) (concurring opinion).

Contrast this case with the *Virginia Surface Mining* facts. The Court held that the Surface Mining Act did not violate the Tenth Amendment because

> the States are not compelled to enforce the steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program.

101 S.Ct. at 2366.

By contrast, this legislation does what Congress had refrained from in that statute. Compare also the position of the United States in this Court on brief in *Mississippi* v. *FERC*, *supra*, Br. 35-41. The Court has cited three cases as examples of situations where federal legislation unconstitutionally "commandeers the legislative processes of the States": *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1977), *vacated*, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated*, 431 U.S. 99 (1977); *Brown* v. *EPA*, 521 F.2d 827 (9th Cir. 1975), *vacated*, 431 U.S. 99 (1977). We submit that this statute falls into exactly the same pattern.

The court in the *District of Columbia* case held that the regulations would "have the effect of requiring the states to use their agencies and personnel to administer the EPA programs and to appropriate state funds in amounts sufficient to carry out enforcement of the regulations." 521 F.2d at 982. In a statement that applies equally to the regulatory scheme of the Natural Gas Policy Act, the court concluded:

> In essence, the Adminstrator is here attempting to commandeer the regulatory powers of the states, along with their personnel and resources, for use in administering and enforcing a federal regulatory program . . . .

Id. at 992.

2. The Natural Gas Policy Act was drafted after these cases made clear that Congress lacks power under the Commerce Clause to require the states to implement a federal regulatory program. As a result, Section 503(c) purports to grant a state regulatory agency the right "to waive its authority to make determinations" — a right exercisable, however, "only by a written agreement" with the Commission — and provides that in the event of waiver "the Commission shall . . . make the determinations." Yet the Commission has insisted that the States carry out the Federal statute.

The Commission has made clear in its regulations that it will not make these determinations. For example, the Commission does not permit a state simply to waive all responsibility for making pricing determinations. The state's request for a waiver must specify "each class of determination for which a waiver is sought," the "reasons the jurisdictional agency believes a waiver is necessary," and the "length of time any waiver is to remain in effect." 18 C.F.R. §274.302(b). More important, the Commission's regulations specifically provide that a producer may not sell gas under the Act unless he has first filed for a pricing determination by a State "jurisdictional agency," which has itself (1) "filed a report in conformance with §274.105," and (2) "notified the Commission in writing that such agency has authority to process applications for determinations . . . and is making such determinations." 18 C.F.R. §273.202. Under Section 274.105, the report to be filed by the State agency must assure the FERC that the agency "will take such steps as are reasonably necessary or appropriate to perform its functions under this part and [describe] the method by which such agency will make determinations." In commenting on the proposed

regulation, producers asked to file their well determinations directly with the FERC to avoid injury if the State failed to comply with the statute. The Commission rejected this request (43 Fed. Reg. 56496-97 (Dec. 1, 1978)), which removes any doubt that Congress meant what it said. The State agencies must administer the statute. This is the contemporaneous construction the district court looked for but did not see. 494 F. Supp. at 661, State App. B-37-38.

In refusing to implement the Act, the Commission was complying with the intent of Congress. Congress never considered expanding the Commission staff to enable Federal price determinations. In the voluminous legislative history of the Act there is ample proof that Congress never considered any alternative to using State resources. Representative Dingell, Chairman of the House Subcommittee on Energy and Power, which held the most extensive hearings on the bill, stated to the House:

> [A] number of questions have arisen regarding the relationship between the FERC and the state agencies to which significant responsibility is entrusted under section 503. It must be acknowledged that cooperation between the Commission and state regulatory agencies will be essential to the successful implementation of the bill.

124 Cong. Rec. H 13119 (Oct. 14, 1978).

In a letter and memorandum to Senator Jackson, floor manager of the bill, Chairman Curtis of the FERC stated that "the task of administration and enforcement of the statutory scheme will be most difficult" and "will necessitate . . . a high degree of cooperation of the various State and Federal agencies who are assigned responsibilities under it." 124 Cong. Rec. H 13127 (Oct. 14, 1978). "The NGPA contemplates," the memorandum concluded, that the required price "determinations will be made by state agencies in the case of onshore production, and a federal agency (presumably U.S. G[eological] S[urvey] in the case of offshore production." *Id.*

3. The Court of Appeals misunderstood the intent of Congress in stating that, as "in *Hodel* v. *Virginia*, the NGPA simply allows the states to participate in the administration of the Act." And that, "there, as here, '[i]f a State does not wish to submit a proposed permanent program . . ., the full regulatory burden will be borne by the Federal Government.' " App. A-18. The Surface Mining Act gave the states a real option. *See* 101 S.Ct. at 2357.

The NGPA became effective three weeks after enactment. As of December 1, 1978, natural gas could not be sold at the maximum ceiling prices the Act imposed except by filing for a well determination. The FERC required these well determinations to be filed with the States. After April 1, 1979, collection of prices under Sections 102, 103, 107, and 108 were simply lost if the States refused to carry out the program. Congress failed to provide any federal agency with the capability of making those determinations. It is simply not credible to argue, as the government argued below, that Congress contemplated that the States have freedom of choice whether to implement the Act. Even assuming that Congress could roll back the prices collected by a state's producers for interstate gas to the 1975 level in a time of inflation, does Congress have the power to coerce the states by threatening the states' inhabitants with economic turmoil? This level (the "other gas" price of Section 109) is the one the Government asserts on brief that gas producers could collect if the State agencies refused to process well determinations. On December 1, 1978, the difference between the 1975 price level and the "new" gas price level was 44 cents per Mcf. As of January, 1982, the difference had grown to 87.5 cents per Mcf. That figure represents about one-quarter to one-third the value of "new" gas. Even if Congress may impose such a punitive price ceiling on citizens of a single state, the price differential of Section 109 threatened a substantial loss in revenue to the States themselves, as the record before the lower Court shows. Oklahoma, Texas, and Louisiana depend heavily on production

and severance taxes for much of their revenue. Unlike the Surface Mining Act, the NGPA is "a carefully constructed device" to compel implementation.

The district court held that this threat did not prove coercion. "[W]hen the implementation by the states of a federal act cannot, under the act, be enforced by the imposition of sanctions, the Tenth Amendment is not implicated." 494 F. Supp. at 660, App. B-36-37. This Court should reject this sterile view of the Constitution.

We believe this constitutes coercion. The States had no real choice. It was the duty of Congress to respect their sovereignty by offering them such a choice. That Congress deliberately refused to do.

4. On brief in *Mississippi* v. *FERC*, No. J79-0212(C) (S.D. Miss. Feb. 27, 1981), *prob. juris noted*, No. 80-1749, 49 U.S.L.W. 3939, (U.S. June 16, 1981), the Government argues that the energy plan passed by Congress "justifies the subordination of state concerns to national purposes" (U.S. Br. 41-42). That argument might justify the Natural Gas Policy Act if the statute were "carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." *National League of Cities* v. *Usery*, 426 U.S. at 853. But certain of the price determinations imposed by Congress in this statute will remain with the States forever. Much gas remains under Section 103, Section 107, and Section 108 in perpetuity. *See* Section 121, 15 U.S.C. 3331.

The Court should strike down a statute that compels the States to act as permanent dependencies of the Federal government. Under this Act, Texas, Oklahoma, and Louisiana have become administrative districts like the departments of France.

II. The Commerce Power Does Not Extend To Gas Sold Wholly In Intrastate Commerce With No Effect On Interstate Commerce.

Even by the sweeping standards of the Commerce Clause, this statute is novel. Congress regulates "existing intrastate contracts" and freezes their price terms as of November 8, 1978. Yet this existing intrastate commerce does not affect interstate commerce at all. The class of existing intrastate contracts represent transactions that have already taken place. To freeze the price of these sales will not add or subtract a cubic foot of gas in the interstate market. The argument is not over "substantial effect" or "rational connection". There is no effect and no connection. Whether the contracts last one, 10, or 20 years or longer, the gas has been committed wholly to the intrastate market.

Congress undoubtedly possesses authority to regulate activities leading to the pollution of streams, erosion, landslides, and flooding as in the *Virginia Surface Mining Case*, 101 S.Ct. at 2360-62, because their effects cannot be confined to one state. But Congress has no power to set maximum legal prices for natural gas produced, sold, transported, and consumed entirely intrastate and not sold in competition with interstate commerce. Extension of the commerce power to new uses has not changed the basic principle that "Congress possesses [no] authority to regulate the internal commerce of a State, as such." *Shreveport Rate Clauses (Houston, E.&W. Texas Ry. Co.* v. *United States)*, 234 U.S. 342, 353 (1914). The district court failed to perceive the distinction between gas already committed to intrastate commerce and gas committed under the NGPA.

Wickard v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); and the *Shreveport Rate Cases*, 234 U.S. 342 (1914), relied on by the courts below, hold that Congress's authority to set minimum prices for commodities and services sold in interstate commerce includes

the authority to regulate intrastate commodities and services competing in the same market. But here, for the first time, Congress has regulated the price of an intrastate commodity not sold in competition with interstate commodities. This case goes beyond *Wickard* v. *Filburn*. The separate distribution system for intrastate gas means that not even the cumulative effect of these existing sales will affect interstate sales. There is no connection between this commerce and interstate commerce.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William Pannill, the attorney for Petitioners Ralph L. Harvey and Marlin Oil Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 11th day of January, 1982, I served three copies each of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit on all parties thereto pursuant to Rule 28, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Federal Energy Regulatory Commission, by mailing a copy, in a duly addressed envelope, with airmail postage prepaid to Charles A. Moore, General Counsel, Federal Energy Regulatory Commission, Room 8000, 825 N. Capitol Street N.E., Washington, D. C. 20426.

3. On the State of Oklahoma, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105.

4. On the State of Texas, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

5. On the State of Louisiana, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, 1889 Wooddale Blvd., Suite 716, Baton Rouge, Louisiana 70806.

WILLIAM PANNILL

Filed on January 11, 1982
in the United States Supreme Court

Appendix

STATUTORY APPENDIX

Article I, Section 8, Clause 3, of the Constitution of the United States provides:

> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Article IV, Section 4, of the Constitution of the United States provides:

> The United States shall guarantee to every state in this union a Republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Section 105 of the Natural Gas Policy Act of 1978 provides:

SEC. 105 CEILING PRICE FOR SALES UNDER EXISTING INTRASTATE CONTRACTS.

(a) APPLICATION. — The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act.

(b) MAXIMUM LAWFUL PRICE. —

(1) GENERAL RULES. — Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of —

(A) the price under the terms of the existing contract, to which such natural gas was subject on the date of the enactment of this Act, as such contract was in effect on such date; or

(B) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(2) CONTRACT PRICE EXCEEDING NEW GAS CEILING PRICE ON ENACTMENT. — In the case of any natural gas described in subsection (a) for which the contract price applicable on the date of the enactment of this Act exceeds the maximum lawful price, per million Btu's, computed for such date under section 102 (relating to new natural gas), the maximum lawful price under this section shall be the higher of —

(A) the maximum lawful price, per million Btu's, computed for such month under section 102; or

(B) (i) the contract price on the date of the enactment of this Act, in the case of the month in which this Act is enacted; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(3) PRICE INCREASES RESULTING FROM INDEFINITE PRICE ESCALATOR CLAUSES. —

(A) IN GENERAL. — Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is higher than $1.00 per million Btu's, the maximum lawful price under this section for any such natural gas delivered during any month shall be the higher of —

(i) the maximum lawful price, per million Btu's, computed under paragraph (2)(B); or

(ii)(I) In the case of January 1985, the maximum lawful price, per million Btu's, computed under section 102 (relating to new natural gas) for such month; and

(II) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this clause for the immediately preceding month multiplied by the monthly equivalent of the sum of a factor equal to the annual inflation adjustment factor applicable for such month plus .03.

(B) DEFINITION OF INDEFINITE PRICE ESCALATOR CLAUSE. — For purposes of this paragraph, the term "indefinite price escalator clause" includes any provision of any contract —

(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, for refined petroleum products; or

(ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

(C) CONTRACT MODIFICATIONS AFTER MAY 3, 1978, TO BE DISREGARDED. — In the case of any natural gas which was subject to any contract on May 3, 1978, that contained an indefinite price escalator clause on such date, no amendment to or modification of the operation of such contract made after such date may have the effect of limiting or precluding the application of this paragraph on or after January 1, 1985, to prices allowed with respect to such natural gas.

(D) EXCLUSION. — Subparagraph (A) shall not apply to any first sale of new natural gas (as defined in section 102(c)), stripper well natural gas (as defined in section 108(b)), high-cost natural-gas (as defined in section 107(c)), natural gas produced from a new, onshore production well (as defined in section 103(c)) from a completion location located at a depth of more than 5,000 feet, and, beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section

122, natural gas produced from any new, onshore production well (as defined in section 103(c)) from a completion location located at a depth of 5,000 feet or less.

(c) DEFINITION OF CONTRACT PRICE. — For purposes of this section, the term "contract price", when used with respect to any specific date, means —

(1) the price paid, per million Btu's, under a contract for deliveries of natural gas occurring on such date; or

(2) if no deliveries of natural gas occurred under such contract on such date, the price, per million Btu's, that would have been paid had such deliveries occurred on such date.

Section 106 of the Natural Gas Policy Act of 1978 provides:

SEC. 106. CEILING PRICE FOR SALES UNDER ROLLOVER CONTRACTS

(a) INTERSTATE ROLLOVER CONTRACTS. — In the case of any first sale under any rollover contract of natural gas which was committed or dedicated to interstate commence on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of —

(1)(A) in the case of the month in which the effective date of such rollover contract occurs, the just and reasonable rate, if any, per million Btu's established by the Commission and applicable on such date to the natural gas subject to the expired contract; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(2)(A) $.54 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this

paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

For purposes of this subsection, the term "rollover contract" includes any contract which would have been a rollover contract but for the fact that the expiration of the previous contract occurred prior to the day before the date of the enactment of this Act.

(b) INTRASTATE ROLLOVER CONTRACTS. —

(1) GENERAL RULE. — In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of —

(A)(i) the maximum price paid under the expired contract, per million Btu's, in the case of the month in which the effective date of such rollover contract occurs; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(B)(i) $1.00 per million Btu's, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) CERTAIN STATE OR INDIAN PRODUCTION OR ROYALTY SHARES. —

(A) GENERAL RULE. — In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and

which constitutes a State government's or Indian tribe's natural gas production, or royalty share or other interest (as of such day) in natural gas production, from real property (including subsurface mineral interests) owned on the date of the enactment of this Act by such State government or Indian tribe (as the case may be), the maximum lawful price under this subsection for any such natural gas delivered during any month shall be the maximum lawful price, per million Btu's computed for such month under section 102 (relating to new natural gas).

(B) INDIAN TRIBAL LANDS. — For purposes of this paragraph, land shall be considered to be owned by an Indian tribe only if —

(i) such land is owned directly by such tribe; or

(ii) such land is held by the United States or any State in trust for Indian persons and is located within the boundaries of an Indian reservation (as such boundaries were in effect on the date of the enactment of this Act).

(C) DEFINITIONS. — For purposes of this paragraph —

(i) STATE GOVERNMENT. — The term "State government" means any State or any agency, instrumentality, or political subdivision of a State.

(ii) INDIAN TRIBE. — The term "Indian tribe" means any Indian tribe recognized as eligible for services provided by the Secretary of the Interior to Indians.

(c) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE. — The Commission may, by rule or order, prescribe a maximum lawful price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is —

(1) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(2) just and reasonable within the meaning of the Natural Gas Act.

Section 503 of the Natural Gas Policy Act of 1978 provides:

SEC. 503. DETERMINATIONS FOR QUALIFYING UNDER CERTAIN CATEGORIES OF NATURAL GAS.

(a) GENERAL RULE. —

(1) DETERMINATION. — If any State or Federal agency makes any final determination which it is authorized to make under subsection (c) for purposes of —

(A) applying the definition of new natural gas under section 102(c);

(B) deciding if certain natural gas produced from the Outer Continental Shelf qualifies under section 102(d) for the new natural gas ceiling price;

(C) applying the definition of new, onshore production well under section 103(c);

(D) applying the definition of high-cost natural gas under section 107(c); or

(E) applying the definition of stripper well natural gas under section 108(B);

such determination shall be applicable under this Act for such purposes unless such determination is reversed under the provisions of subsection (b) or unless such State or Federal agency has waived its authority under the provisions of subsection (c).

(2) NOTICE TO COMMISSION. — Any Federal or State agency making a determination under paragraph (1) shall provide timely notice in writing of such determination to the Commission. Such notice shall include such substantiation and be in such a manner as the Commission may, by rule, require.

(b) COMMISSION REVIEW. —

(1) AUTHORITY TO REVIEW AND REVERSE. — The Commission shall reverse any final State or Federal agency determination described in subsection (a) if —

(A) it makes a finding that such determination is not supported by substantial evidence in the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) and the final such finding is made within 120 days after the date of the preliminary finding.

(2) REMAND ON BASIS OF COMMISSION INFORMATION. — If —

(A) the Commission finds that a State or Federal agency determination is not consistent with information contained in the public records of the Commission, and which is not part of the record upon which such determination was made; and

(B) such preliminary finding and notice thereof under paragraph (3) is made within 45 days after the date on which the Commission received notice of such determination under subsection (a)(2) and the final such finding is made within 120 days after the date of the preliminary finding,

it may remand the matter to such State or Federal agency for consideration of such information. If such agency, after consideration of the information transmitted to it by the Commission, affirms its previous determination, such determination, as so affirmed, shall be subject to review in accordance with this subsection (other than this paragraph).

(3) NOTICE. — The Commission shall provide notice of any proposed finding under this subsection to the State or Federal agency which made such determination and those parties identified in the notice to the Commission of such determination.

(4) JUDICIAL REVIEW OF COMMISSION ACTIONS. —

(A) REMANDS. — Any party identified in the notice to the Commission of a determination by a State

or Federal agency may obtain review of any final decision by the Commission to remand under paragraph (2) in the United States Court of Appeals for any circuit in which such party is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such decision if it finds such decision is arbitrary or capricious.

(B) FINDINGS. — Any person aggrieved or adversely affected by a final finding of the Commission under paragraph (1) may within 60 days thereafter file a petition for review of such finding in the United States Court of Appeals for any circuit in which the party involved in such determination is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. The reviewing court shall reverse any such finding of the Commission if the State or Federal agency determination involved is supported by substantial evidence.

(c) STATE AUTHORITY. —

(1) GENERAL RULE. — A Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a).

(2) WAIVER. —

(A) IN GENERAL. — Any Federal or State agency may, in whole or in part, waive its authority to make determinations referred to in subsection (a)(1) by entering into an agreement in accordance with subparagraph (B). If such agency executes such a waiver, the Commission shall, consistent with the agreement, make the determinations which would otherwise be made by such Federal or State agency until the earlier of —

(i) the expiration of the period specified in the agreement; or

(ii) the date such agency transmits to the Commission written notice that it terminates such waiver

and assumes the authority to make determinations referred to in subsection (a)(1).

Any waiver, or termination of any waiver, shall not apply to any determination with respect to any petition therefor which is pending before such agency or the Commission (as the case may be) on the date on which such a waiver or revocation is made.

(B) AGREEMENTS. — Any waiver under subparagraph (A) may be made only by a written agreement between the Federal or State agency involved and the Commission. Any such agreement shall set forth the terms and conditions applicable to such waiver.

(3) PROCEDURES APPLICABLE. — Determinations of a Federal or State agency referred to in subsection (a)(1) shall be made in accordance with the procedures generally applicable to such agency for the making of such determinations or comparable determinations under the provisions of Federal or State law, as the case may be, pursuant to which they exercise their regulatory jurisdiction. The Commission may prescribe the form and content of filings with a Federal or State agency in connection with determinations made under this section.

(4) JUDICIAL REVIEW. — Any such determination referred to in subsection (a)(1) made in accordance with procedures described in paragraph (3) shall not be subject to judicial review under any Federal or State law except as provided under subsection (b).

(d) EFFECT OF DETERMINATIONS. — For purposes of this Act —

(1) GENERAL RULE. — Any final determination referred to in subsection (a)(1) made by a Federal or State agency (or by the Commission under subsection (c)(2)) which relates to any natural gas and which is no longer subject to review by the Commission under this section or to judicial review shall thereafter be binding with respect to such natural gas. The preceding sentence shall not apply to any final determination —

(A) if in making such determination the Commission or such Federal or State agency relied on any untrue statement of a material fact; or

(B) if there was omitted a statement of material fact necessary in order to make the statements made not misleading, in light of the circumstances under which they were made, to the Federal or State agency in making such final determination or to the Commission in reviewing such determination.

(2) APPLICATION OF TITLE 18. — Any untrue statement or omission of material fact to a Federal or State agency upon which the Commission relied shall be deemed to be statement or entry under section 1001 of title 18, United States Code.

(c) INTERIM COLLECTION OF MAXIMUM LAWFUL PRICE. —

(1) COLLECTION OF SECTION 109 PRICE. —

(A) GENERAL RULE. — Effective beginning on the first day of the first month beginning after the date of the enactment of this Act, a seller of natural gas which is produced from a new well may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price under section 109 for any first sale of such natural gas.

(B) REQUIREMENTS. — A seller may charge and make collections under subparagraph (A) only in accordance with the following requirements:

(i) SWORN STATEMENT. — Before any such collection is made, the seller shall file with the Commission, and any Federal or State agency having authority to make determinations referred to in subsection (a)(1), a written sworn statement that such natural gas is produced from a new well and that such seller believes in good faith that such natural gas is eligible under this Act to be sold at a price not less than the appropriate maximum lawful price under section 109.

(ii) PETITION FOR DETERMINATION. — Within 90 days after the date of the enactment of this Act, the seller files a petition to such Federal or State agency for a determination under this section.

(iii) COLLECTION SUBJECT TO REFUND. — Any such collection made by the seller pending a determination under this section shall be collected subject to a condition of refund, with interest, in the event it is determined by such Federal or State agency that the applicable maximum lawful price is lower than that provided under section 109.

(2) ALTERNATE INTERIM COLLECTION AUTHORITY. —

(A) GENERAL RULE. — Promptly after the date of the enactment of this Act, the Commission shall, by rule or order, provide one or more methods under which a seller of natural gas may in accordance with requirements established, and for such period as may be prescribed, under such rule or order, charge and collect for any first sale of such natural gas the maximum lawful price under title I for which a petition is filed for a determination under this section in any case in which such price exceeds the appropriate maximum lawful price under section 109.

(B) COLLECTION SUBJECT TO REFUND. — Any such collection made by the seller pending a determination under section 503 shall be collected subject to a condition of refund, with interest. Such refund with interest shall be paid, in accordance with the rule under subparagraph (A), unless it is determined under this Act that the applicable maximum lawful price is equal to or greater than that collected. In addition, such seller shall comply with such requirements as the Commission shall prescribe in the applicable rule or order to provide adequate assurance that funds, to the extent attributable to a price in excess of the appropriate maximum lawful price under title I are available in the event of such refund.

(3) COLLECTION AFTER INITIAL DETERMINATION. —

(A) GENERAL RULE. — Effective beginning on the date of the notice of a determination under subsection (a)(2), a seller of natural gas covered by such determination may, in accordance with subparagraph (B), charge and collect the appropriate maximum lawful price applicable under such determination.

(B) REQUIREMENTS. — A seller may charge and make collections under subparagraph (A) if such collection is subject to conditions prescribed by the Commission to assure refund, with interest, in the event it is determined under this Act that the applicable maximum lawful price is lower than that provided under section 109.

Opposition

Office - Supreme Court, U.S.
FILED
MAR 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1478

In the Supreme Court of the United States

OCTOBER TERM, 1981

RALPH L. HARVEY AND MARLIN OIL CORPORATION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1478

RALPH L. HARVEY AND MARLIN OIL CORPORATION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners argue (1) that Congress, in enacting the Natural Gas Policy Act of 1978 (NGPA), exceeded its powers under the Commerce Clause in setting maximum legal prices for natural gas produced, sold, transported and consumed intrastate; and (2) that Title V of the Act, which permits the states to make price category determinations for certain sales of natural gas, impinges upon powers reserved to the states under the Tenth Amendment.

1. The background of this litigation is described in our brief in opposition to the petition for a writ of certiorari in *Texas* v. *FERC*, No. 81-1232 (at 2-4).[1] On November 20,

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[1] We are sending petitioners a copy of our brief in opposition in No. 81-1232.

1978, the States of Texas, Louisiana and Oklahoma filed a complaint in the United States District Court for the Western District ofOklahoma, challenging the constitutionality of the Natural Gas Policy Act of 1978. Petitioner Ralph L. Harvey, individually and as president of Marlin Oil Corporation, an Oklahoma gas producer, was granted leave by the district court to intervene in the action. Petitioners and the States argued, inter alia, that certain provisions in Title I of the NGPA are beyond Congress' power under the Commerce Clause, and that Title V of the Act impermissibly impinges on state sovereignty, in violation of the Tenth Amendment. The district court rejected these arguments and granted the Commission's motion for summary judgment (81-1232 Pet. App. B-1 to B-41). The court of appeals affirmed (81-1232 Pet. App. A-1 to A-18).

2. Petitioners argue (Pet. 20-21) that the Commerce Clause does not authorize Congress to regulate the price of intrastate gas, at least with respect to gas sold pursuant to intrastate contracts in effect at the time of the adoption of the NGPA.[2] This claim is insubstantial.

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[2]Under Section 105 of the NGPA, 15 U.S.C. (Supp. IV) 3315, a seller of gas under an existing intrastate contract may collect the contract price, subject to certain limitations. Generally, the contract price for such transactions is subject to a ceiling, which is the maximum price for "new" natural gas contemporaneously being sold in the interstate and intrastate markets under Section 102 of the NGPA, 15 U.S.C. (Supp. IV) 3312. See 15 U.S.C. (Supp. IV) 3315(b)(1). If the contract price at the time of the NGPA's adoption exceeded the "new" gas price on that date, no price reduction is required, although there are restrictions on subsequent price increases. See 15 U.S.C. (Supp. IV) 3315(b)(2).

If the gas was covered by an intrastate contract on the date of the NGPA's enactment, it remains subject to the pricing provisions of Section 105 even if the contract is subsequently terminated. See 15 U.S.C. (Supp. IV) 3315(a). On the other hand, if the contract expires by its own terms at the end of a fixed period, succeeding sales are governed instead by the price provisions of Section 106(b), 15 U.S.C. (Supp. IV) 3316(b).

In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), this Court held that the Natural Gas Act applied to producer sales of natural gas in interstate commerce. Subsequently, and in large measure as a result of implementation of the *Phillips* decision, the market for natural gas divided into a regulated interstate market and several distinct, unregulated intrastate markets. By the 1970's this division had resulted in higher prices in the intrastate markets and serious shortages in the interstate market. A central purpose of Congress in enacting the NGPA was to eliminate these dual markets and create a single national market where both interstate and intrastate purchasers would have equal access to new gas supplies without substantial price disparity. One of the ways in which Congress chose to achieve this result was to impose limited price regulation on intrastate producer sales of natural gas.

Petitioners suggest that Congress should not have extended price regulation to gas that had already been committed to the intrastate market. Their argument assumes that there is no flow of gas from intrastate to interstate markets, but Congress undoubtedly was aware that such flows had occurred in the past (see 18 C.F.R. 2.68, 157.22(a), (1978)), and it contentemplated that such flows would occur in the future. See Sections 311 and 312 of the NGPA, 15 U.S.C. (Supp. IV) 3371, 3372. Thus, Section 311(b) of the Act, 15 U.S.C. (Supp. IV) 3371(b), permits the Commission to authorize any intrastate gas pipeline to sell gas to an interstate pipeline or to a local gas distribution company served by an interstate pipeline. Since the enactment of this provision, substantial amounts of gas have been moving from the intrastate to the interstate market. In Oklahoma alone, the Commission has already authorized intrastate pipelines to sell and deliver up to 475 billion cubic feet of gas to interstate companies.

As the experience in implementing Section 311(b) suggests, an initial sales contract for gas does not necessarily reflect a permanent disposition of that gas, a fact of which Congress was well aware. Moreover, it is readily apparent that the price at which the gas is initially sold in the intrastate market may affect interstate consumers. The price at which gas may be sold pursuant to Section 311(b) includes the "intrastate pipeline's weighted average acquisition cost of natural gas" (15 U.S.C. (Supp. IV) 3371(b)(2)(A)(i)), so that any higher costs of intrastate gas ordinarily will be passed on to the interstate consumers.

In light of this background, the courts below correctly rejected petitioners' Commerce Clause claim (81-1232 Pet. App. A-11 to A-14, B-22 to B-28). As this court has recently observed, "[a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce." *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 7. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States * * *." *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, No. 79-1538 (June 15, 1981), slip op. 10, quoting from *Fry* v. *United States*, 421 U.S. 542, 547 (1975). Congress clearly acted within its lawful Commerce Clause authority when it provided for federal regulation of the price of intrastate gas.

2. Petitioners' Tenth Amendment claim (Pet. 13-19) is adequately answered in our brief in opposition in *Texas* v. *FERC*, No. 81-1232, and we rely on that response here. Additionally, we note that there is a serious question whether petitioners have standing to raise the Tenth Amendment claim since they have not shown that they have suffered, or are likely in the future to suffer, any injury by

virtue of the fact that state, rather than federal, regulatory authorities are making the initial determinations as to whether their wells meet the requisite standards set forth in the statute to qualify for the higher incentive prices offered under certain sections of the NGPA. See *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, No. 80-327 (Jan. 12, 1982), slip op. 7-11.

Thus, in the courts below, petitioners claimed only that they had applications pending with state officials in Oklahoma for price determinations under Section 503 of the Act, 15 U.S.C. (Supp. IV) 3413, that the Commission would review the state determinations pursuant to 15 U.S.C. (Supp. IV) 3413(b)(1)(A), and that some of their price determination claims might be disallowed. Even assuming that the State of Oklahoma made these price determinations under constitutionally impermissible compulsion, however, petitioners fail to suggest how they are adversely affected by having the initial price category determinations made by state authorities. Presumably, at the end of the process, petitioners will have received whatever prices they are entitled to under the Act. If their claims are disallowed, that result will not come about because the state administers the program, but because Congress did not allow incentive prices for that gas.[3]

---

[3]Nor is petitioners' standing enhanced by their suggestion (Pet. 8-9, 13, 16) that if Oklahoma officials do not make these determinations, no one will. The fact remains that state officials are making these determinations. Moreover, as the district court noted (81-1232 Pet. App. B-37 to B-38), neither Oklahoma nor any other state has asked the Commission to execute a waiver, as authorized by Section 503(c)(2), 15 U.S.C. (Supp. IV) 3413(c)(2). If such a waiver were executed, the Commission, rather than the state, would be responsible for carrying out this function. Petitioners ask the Court to assume that the Commission would refuse a waiver when the Commission has not done so. Accordingly, any constitutional claim on this ground is premature. See *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 162-164 (1967).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1982

DOJ-1982-03

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1478

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AND
THE UNITED STATES,

Respondents.

REPLY TO MEMORANDUM IN OPPOSITION

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Respondents.

REPLY TO MEMORANDUM IN OPPOSITION

The Government's opposition rests on two errors:

1. The Government argues that Harvey lacks standing to challenge Section 503 of the statute. The district court rejected this claim, holding that Harvey was aggrieved by the statute as a whole. 494 F.Supp. at 636 (Pet. App. No. 81-1232, Appendix B-10-11). The Government failed to appeal. The Government now asks this Court to decide whether Harvey has standing section by section.

This contention is a smokescreen, laid down because the Government has no real defense for Section 503 of the Natural Gas Policy Act. We are filing with this brief a motion to consolidate this case with *Texas* v. *FERC*, No. 81-1232. We wish to remove any question that the Court may consider the merits of a statute that "commandeers the legislative, [judicial, and administrative] processes of the states by directly compelling

them to enact and enforce a federal regulatory program." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981). The presence in this case of the states of Texas, Oklahoma, and Louisiana ought to satisfy the Government that a controversy has arisen under the Tenth Amendment.

In the alternative, the Government argues that the constitutional issue raised by Section 503 is premature because the FERC has never refused a waiver (U.S. Memo. at 5 n. 3). That is wrong. The Commission has refused to waive the requirement that the states agree to process the price filings commanded by this statute.

The FERC has interpreted this statute to mean that the Federal agency has the power to grant or deny the states a waiver. *See* 18 C.F.R. §§274.302, 274.303. In the preamble to its Order No. 41, the FERC interpreted Section 503 of the Act as follows:

> One State filed a comment suggesting that the Commission does not have the discretion to refuse any request for a waiver. We disagree. Section 503(c)(2)(A) of the NGPA stipulates that a Federal or State agency may waive its authority to make determinations "by entering into an agreement" in accordance with subparagraph (B). Subparagraph (B), in turn, provides that any waiver may be made "only by a written agreement" between the agency and the Commission. We believe that this language provides the Commission with the discretion to agree or not to agree to a proposal for a waiver and thus to grant or refuse a request for waiver.

44 Fed. Reg. 48664, 48666 (Aug. 20, 1979).

Pursuant to the statute, the Commission refuses to consider any applications for well determinations and directs that all such applications be filed with the state agencies. The FERC has coerced the states and threatened their citizens by denying higher price ceilings and higher severance taxes within any state that refuses to carry out Federal price redeterminations. We

believe such an arbitrary distinction itself denies the equal protection of the law. *Compare* U.S. Const. Amend. V, XIV. Thus, in its interim regulations issued December 1, 1978, the FERC warned producers that no higher prices could lawfully be collected until the state having jurisdiction over the well agreed to administer the Federal program.

> Many comments requested deletion of the proposed condition . . . that collection cannot begin under this Section until the appropriate jurisdictional agency has filed with the Commission an undertaking to diligently consider and decide applications and the report on procedures to be used by the agency, as required by §274.105. These comments argue that this qualifying condition is unlawful or inequitable, chiefly because compliance is beyond any seller's control. The comments recommend that sellers be permitted to make interim collections under this section after an appropriate filing with the Commission.

43 Fed. Reg. 56496 (Dec. 1, 1978).

Yet the FERC refused to waive this requirement:

> The Commission believes that it is particularly important that higher prices dependent on determinations of eligibility should not be charged and collected, subject to refund, until a jurisdictional agency has undertaken to consider these applications and has established procedures to make determinations that on [sic] these applications. Moreover, collections under this section [503(c)(2)] should not continue if a jurisdictional agency is not actively proceeding to make specific determinations.
>
> To better express our intent, the proposed §273.202(a) will be changed in two respects. First, this condition will be restated as a requirement that no filing to charge and collect a maximum lawful price under this section may be submitted to this Commission until the jurisdictional agency to which the application for determination has been made has filed the report and undertaking required by §274.105. As noted in the discussion of Subpart A of Part 274, the form of the undertaking has been modified to require the jurisdictional agency to state that it will take such steps as are

> reasonable, necessary or appropriate to perform its functions under Part 274. Second, unless a jurisdictional agency has notified the Commission by March 1, 1979, that it is actively processing the applications for determinations, then authority to make interim collections under this section will be suspended with respect to deliveries made during the period from March 1, 1979, until the date on which the jurisdictional agency gives notice that applications are being processed.

Id. at 56496-97.

To carry out this Federal mandate, Oklahoma was forced to pass special legislation, 1979 Okla. Sess. Laws. §§270, 271. Texas now processes 1,200 Federal filings a month in a program that has cost the state $1.2 million to administer. As Chairman Nugent of the Texas Railroad Commission stated:

> I took the oath of office 35 days after the effective date of the NGPA. Before 90 days had passed, over 10,000 filings for category determinations had reached our office.

Hearings on Implementation of Title I of the Natural Gas Policy Act of 1978, 97th Cong., 1st Sess. 53 (Nov. 5, 1981, Pub. No. 97-51).

We believe there can be no comparison between this scheme and the one upheld in the *Hodel* case. This presents an issue of overriding national importance. We believe this Court should consider the issue.

2. The Government also argues that existing intrastate contracts might somehow "affect" the interstate market. "[A]n initial sales contract for gas does not necessarily reflect a permanent disposition of that gas, a fact of which Congress was well aware" (U.S. Br. 4).

The Government fails to point out to the Court that the typical intrastate gas contract contains covenants against commingling intrastate gas in interstate commerce, and it was Congress, not the sellers, that attempted to void such covenants in Section 314 of the Natural Gas Policy Act:

SEC. 314. CLAUSES PROHIBITING CERTAIN SALES, TRANSPORTATION, AND COMMINGLING.

(a) General Rule. Any provision of any contract for the first sale of natural gas is hereby declared against public policy and unenforceable with respect to any natural gas covered by this Act if such provision —

(1) prohibits the commingling of natural gas subject to such contract with natural gas subject to the jurisdiction of the Commission under the provisions of the Natural Gas Act;

(2) prohibits the sale of any natural gas subject to such contract to, or transportation of any such natural gas by, any person subject to the jurisdiction of the Commission under the Natural Gas Act, or otherwise prohibits the sale or transportation in interstate commerce (within the meaning of the Natural Gas Act) of natural gas subject to such contract; or

(3) terminates, or grants any party the option to terminate, any obligation under any such contract as a result of such commingling, sale, or transportation.

See California v. *LoVaca Gathering Company*, 379 U.S. 366 (1965); *Commission Interpretation of Section 314 of the NGPA*, 44 Fed. Reg. 18966 (March 30, 1979). The FERC itself stated:

> Sections 311 and 312 represent a statutory mandate to create an integrated nationwide system for the sale and transportation of natural gas.

Id. Thus it is the Federal Government that wishes to move gas from the intrastate to the interstate market. The Government turns the statute on its head when it argues that Federal efforts to attract gas out of intrastate commerce justify price controls on existing intrastate contracts. The question is whether Congress may create an integrated system that controls the price of gas already committed to local use.

For at least seven years, Congress has fastened price controls on a local market that by definition does not affect interstate commerce. The Government justifies this novel statute in this Court on the grounds that the gas might enter the stream of national commerce one day. We believe the commerce of sellers like Harvey is beyond the commerce power so long as that commerce is completely confined to one state. If the Court accepts this bootstrap justification, the commerce power will have no limits.

No one doubts Congress's power to control the terms and conditions on which an intrastate seller may enter national commerce. The question is whether Congress may reach commerce before the seller chooses the interstate channel. *California* v. *LoVaca Gathering Company*, 379 U.S. at 369. "The actual facts govern." *Sprout* v. *City of South Bend*, 277 U.S. 163, 168 (1928) (Brandeis, J.). "The importance of the commerce clause to the Union is of course very great. But it also is important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts." *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, 395 (1929) (Holmes, J.).

We urge the Court to grant the application for certiorari and decide these important questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William Pannill, the attorney for Petitioners Ralph L. Harvey and Marlin Oil Corporation,[1] and a member of the Bar of the Supreme Court of the United States, hereby certify that, on this 20th day of April, 1982, I served three copies each of the foregoing Reply to Memorandum in Opposition to the United States Court of Appeals for the Tenth Circuit on all parties thereto pursuant to Rule 28, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Federal Energy Regulatory Commission, by mailing a copy, in a duly addressed envelope, with airmail postage prepaid to Charles A. Moore, General Counsel, Federal Energy Regulatory Commission, Room 8000, 825 N. Capitol Street N.E., Washington, D.C. 20426.

3. On the State of Oklahoma, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105.

4. On the State of Texas, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

5. On the State of Louisiana, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to the Attorney General, Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804.

WILLIAM PANNILL

[1]Marlin Oil Corporation has no parent corporation or subsidiaries.

Filed on April 20, 1982 in the
United States Supreme Court